STATE OF MICHIGAN

COURT OF APPEALS

In re FREY, Minors.

UNPUBLISHED
February 26, 2015

Nos. 322672 and 322714
Benzie Circuit Court
Family Division
LC No. 13-001835-NA

Before: RIORDAN, P.J., and MURPHY and BOONSTRA, JJ.

PER CURIAM.

Respondents appeal as of right an order of the trial court terminating their parental rights to their three minor daughters, JF, LF, and VF, under MCL 712A.19b(3)(a)(*ii*) (desertion), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm if child returned to the parent). We affirm.

On April 9, 2013, petitioner filed a petition seeking protective custody of JF, LF, and VF. Petitioner indicated that it had received reports the day before that LF had been hit multiple times in the face by respondent-father and choked by respondent-mother. Caseworker Candice Swander discovered that respondent-father was previously incarcerated for child abuse in Georgia and was released on the condition that he avoid contact with the children. However, once respondent-father was released, he rejoined the family and they moved to Florida. He was arrested in Florida for having contact with the children. Respondent-father was released and then rejoined the family in Nebraska, where he was again arrested. After his release, he rejoined the family in Missouri, and finally the family moved to Michigan in September 2012. The petition alleged that a felony child cruelty charge was currently pending against respondent-father in Georgia.

At an emergency hearing, Swander testified that LF reported that respondent-father hit her at least once a week. LF also confirmed that respondent-mother had choked her. Swander also noted evidence that LF had been whipped with a belt. JF reported, Swander testified, that respondent-father had struck her in the face when she was asked to babysit her sisters but she went upstairs instead. The court ordered petitioner to take protective custody of the children.

On April 29, 2013, the court attempted to conduct a preliminary hearing, but adjourned the matter due to new pending felony child abuse charges against both respondents. The preliminary hearing resumed a few days later, and respondents entered pleas. Respondent-mother admitted that she hit LF twice with a belt on April 7, 2013, and respondent-father admitted that he had entered a no contest plea to fourth-degree child abuse on April 29, 2013.

At a May 24, 2013 initial dispositional hearing, caseworker Brittany Wahr reported that respondents were on time and appropriate at parenting-time visits and that the children were always happy to see their parents. Wahr indicated that respondents were working with the Family Advocate Program and the Parent Aid Program to learn appropriate discipline techniques, respondent-father was in individual counseling, and petitioner had offered to pay the first month of rent and a security deposit if respondents found a house to rent. Wahr testified that respondents needed to obtain appropriate housing and comply with parenting skills services under the parent-agency treatment plan before reunification would be possible.

At a review hearing on August 23, 2013, Wahr testified that respondents received psychological evaluations and continued to receive services, including counseling, parenting visits, paid transportation, gas cards, Family Advocate Program services, and funds to help obtain a home. Wahr reported that respondents had attended all parenting-time visits, except that respondent-father missed one visit due to a court ordered class and one visit due to illness. Wahr indicated that respondents acted appropriately at visits, but she was concerned that they were not taking the service provider's parenting suggestions seriously. Wahr testified that parent-aid workers noted significant problems with respondents' parenting skills and inconsistencies in what respondents told the workers about their history of child abuse. Wahr testified that petitioner had paid $1,200 to cover the down payment and first month of rent on a house for respondents, but they moved out of the home after six weeks. Wahr believed respondents were currently homeless and living at a campground. Wahr reported that respondents were supposed to attend a batterer's intervention program through their probation, but respondent-father had missed three classes and respondent-mother had missed one. Wahr testified that she offered to increase the number and length of visits with the children during the summer when the children were not in school, but respondents refused.

At a review hearing on November 15, 2013, Wahr testified that respondents contacted her on November 12, 2013, to inform her they had moved to Ohio. Wahr testified that respondents ceased participating in all services beginning October 7, 2013. Wahr recommended that the court change the goal from reunification to termination because respondents had not demonstrated benefit from services and failed to provide a stable environment for their children.

On November 27, 2013, petitioner filed a supplemental petition to terminate respondents' parental rights. At a permanency planning hearing on February 7, 2014, the court noted that respondents were not present, although notice was sent to their last known address in Ohio. At a pretrial hearing on March 21, 2014, the court stated that it had sent notices of the hearing to respondents' address in Milford, Ohio, but respondents did not appear. Attorneys for both respondents indicated attempts to communicate with their clients through phone and mail were unsuccessful. At the termination hearing on June 6, 2014, the court stated that notice of the termination hearing had been sent to respondents by certified mail on May 20, 2014, to their last known Ohio address, but there was no response and respondents did not appear for the hearing.

At the termination hearing, James Parrinello, respondents' probation officer, testified that respondents were placed on probation on April 29, 2013, for five years due to their child abuse offenses. Parrinello testified that respondents failed to appear for probation dates, failed to keep current their address, and failed to comply with the required batters intervention treatment program. Emily Norton, a family advocate with Bethany Christian Services, testified that before

moving to Ohio, respondents were living behind a friend's house, then moved to a motel for a week, then relocated to a campground for two weeks, then moved to the home paid for by petitioner for approximately a month, then stayed with a friend for a few weeks, and then ended up living in a campground in Cadillac, Michigan.

Wahr testified that respondents only contact with the girls since October 2013 was sending Christmas presents in March 2014 and sending Easter cards. Wahr testified that when respondents told her of their move, she informed them that they needed to comply with the case-service plan to get the children back and that moving to Ohio would compromise reunification efforts. The court found that termination was appropriate under MCL 712A.19b(3)(a)(*ii*), (g), and (j), and that termination was in the best interests of the children.

I. RESPONDENT-FATHER'S APPEAL

Respondent-father argues that the trial court lacked clear and convincing evidence to terminate his parental rights. If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proven by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011); *In re Moss,* 301 Mich App 76, 90; 836 NW2d 182 (2013). "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

Under MCL 712A.19b(3)(a)(*ii*), termination is appropriate when "[t]he child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period." Here, respondent-father left Michigan in October 2013, and at that point ceased attending hearings relating to his children, participating in court-ordered services, providing support for his children, and visiting his children. Respondent-father argues that on November 15, 2013, the court ordered all parenting-time visits to cease, so he would have been unable to visit or contact the children without violating a court order, regardless of whether he was in the state. However, the November 15th order did not stop respondent-father from continuing to pursue custody of his children. He could have attended hearings, could have provided support for his children, and could have complied with the services he was required to complete to regain custody of his children, but between October 2013 and June 2014 he did none of these things. The sending of Christmas presents in March 2014 and an Easter card did not invalidate the court's finding of desertion, nor did it constitute an effort to seek custody of the children. The trial court did not clearly err in finding that respondent-father had deserted the children for 91 or more days and had not sought custody of the children during that period.

Under MCL 712A.19b(3)(g), termination is proper when "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." Under MCL 712A.19b(3)(j), termination is appropriate when

"[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." A parent's failure to comply with the terms and conditions of his or her service plan is evidence supporting termination under both MCL 712A.19b(3)(g) and (j). *In re White*, 303 Mich App 701, 712-713; 846 NW2d 61 (2014). Termination is also appropriate under MCL 712A.19b(3)(g) and (j) when evidence shows that a respondent inflicted intentional injuries upon a minor child. *In re VanDalen*, 293 Mich App 120, 140-141; 809 NW2d 412 (2011). The evidence regarding the abuse of the children, the wholesale abandonment of the children, the failure to comply with the case service plan, the failure to procure suitable housing, and the history of flight across the country in defiance of the laws of other states easily supported the termination of respondent-father's parental rights under MCL 712A.19b(3)(g) and (j). There was no clear error, but we shall proceed to address some specific arguments made by respondent-father regarding MCL 712A.19b(3)(g) and (j).

With respect to § 19b(3)(g), respondent-father complains that the trial court relied on the testimony of family advocate Emily Norton about the numerous moves made by respondents while in the state of Michigan without any factual finding that the children were harmed by the moves or lacked adequate shelter. This argument lacks merit because the moves testified to by Norton concerned the timeframe in which the children were already in protective care; they were no longer residing with respondents. The argument also misconstrues the trial court's ruling, as the court simply found that respondents had never established housing that would be suitable for the children, noting that it was fortunate that the children were in placement at the time respondents were bouncing from place to place. We also note that there can be no reasonable dispute that a campground would not have sufficed as suitable housing for the children.

In the context of both § 19b(3)(g) and (j), respondent-father argues that because he admitted to pleading no contest to a misdemeanor child abuse charge to give the court jurisdiction over his children, the court was only permitted to consider hearsay evidence on that specific offense at the termination hearing. In connection to § 19b(3)(g), respondent-father contends that the testimony about the lack of suitable housing and numerous moves within the state of Michigan constituted hearsay. We initially note that respondent-father fails to specifically identify the particular offensive testimony in the transcript. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (an appellant cannot simply announce a position or assert error and then leave it up to this Court to rationalize and discover the basis for the claim or to unravel and elaborate the argument). Norton did testify about respondents' numerous moves within the state and the nature of the locations where they resided. However, Norton's testimony was based partially on statements made to her by respondents themselves, e.g., "they had informed me they decided they were going to move;" "[i]n speaking with them, [respondent-mother] had always maintained she felt [Wellston] was a good place[,] [but respondent-father] . . . had changed his mind;" and "I got a phone call that they had decided . . .[t]hey were going to Cadillac and were staying in a campground in Cadillac." These were admissions of party opponents and did not constitute hearsay. MRE 801(d)(2). The other basis for Norton's testimony about respondents' moves and living arrangements was her own personal observations. Norton testified that, with the exception of the campground in Cadillac, she visited with respondents in the various locations where they moved. Accordingly, this testimony was also not hearsay, as there was no out of court statement made by a declarant that formed the basis

of Norton's testimony regarding personal visits. MRE 801(a)-(c). Therefore, the entire foundation of respondent-father's argument collapses.

With respect to the hearsay argument and § 19b(3)(j), respondent-father argues that the trial court impermissibly relied on inadmissible hearsay regarding the *history* of physical abuse, aside from the incident to which he pled no contest, and regarding the failure to comply with a court order issued in Georgia. We first note that the trial court's reference to the Georgia court order pertained solely to the finding that respondent-mother failed to protect the children from respondent-father, and respondent-mother does not challenge the evidence. We now turn to the argument regarding the history of physical abuse.

"The Michigan Rules of Evidence do not apply, other than those with respect to privileges" at a termination hearing that is not part of the initial dispositional hearing or based on a supplemental petition for termination raising new or different circumstances than those leading to the initial adjudication. MCR 3.977(E) (termination at original disposition; requires "legally admissible evidence"),(F) (supplemental petition to terminate based on new or different circumstances; requires "legally admissible evidence"), and (H) (termination of parental rights – other; rules of evidence not applicable except as to privileges; relevant and material evidence may be relied upon). The rules of evidence do apply in regard to a supplemental petition seeking termination "on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction." MCR 3.977(F). In this case, the initial petition for protective custody cited physical abuse and instability as the primary reasons warranting protective custody. On May 3, 2013, respondent-father entered a plea admitting to pleading no contest to a child abuse charge that had arisen in Michigan; the plea in family court did not pertain to past incidents of alleged physical abuse. Assuming that hearsay evidence was improperly used to establish physical abuse of the children by respondent-father, aside from the abuse for which he pled no contest, we still cannot find clear error under § 19b(3)(j) in light of the no-contest plea to some physical abuse when considered with all of the other untainted evidence. Regardless, even if the trial court clearly erred in terminating parental rights under § 19b(3)(j), there was no clear error under both § 19b(3)(a)(*ii*) and (g), and only one ground was necessary for termination. MCL 712A.19b(3); *In re Ellis*, 294 Mich App at 32.

II. RESPONDENT-MOTHER'S APPEAL

Respondent-mother first argues that she was not personally served with a copy of the summons relative to the hearing on the supplemental petition for termination of her parental rights, but was instead sent documents by certified mail, absent a court order authorizing alternative service. Therefore, according to respondent-mother, the trial court lacked jurisdiction to terminate her parental rights.

In November 2013, respondent-mother sent a letter to the trial court that provided a specific address in Milford, Ohio, where respondents were now supposedly residing. A supplemental and an amended supplemental petition to terminate parental rights were mailed by the trial court to the address in Milford, Ohio. And a summons to appear for the termination hearing was sent by certified mail to the address in Milford, Ohio, but it was returned as undeliverable. Previous certified mailings to both respondents at the Ohio address relative to other hearings were also returned as undeliverable, which the court took note of before the

hearings. At the termination hearing, the trial court stated that respondents had "not appeared at several hearings recently," that the notices for the termination hearing "were sent out in more than timely fashion," and that there were "two outstanding bench warrants for them" in the district court for probation violations.

"A parent of a child who is the subject of a child protective proceeding is entitled to personal service of a summons and notice of proceedings." *In re SZ*, 262 Mich App 560, 564-565; 686 NW2d 520 (2004), citing MCL 712A.12 and MCR 3.920(B)(4)(a). A summons regarding a termination proceeding generally falls within that rule. MCR 3.977(C)(1) (incorporating MCR 3.920). MCR 3.920(B)(4)(b) provides:

> If the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication.

This provision was not followed by the trial court in this case. However, this Court has held that "MCL 712A.13 is the controlling statute regarding substituted service" and that MCL 712A.13 prevails over MCR 3.920(B)(4)(b) for purposes of jurisdiction. *In re SZ*, 262 Mich App at 566-570; *In re Mayfield*, 198 Mich App 226, 230-231; 497 NW2d 578 (1993). MCL 712A.13 provides:

> Service of summons may be made anywhere in the state personally by the delivery of true copies thereof to the persons summoned: Provided, That if the judge is satisfied that it is impracticable to serve personally such summons or the notice provided for in the preceding section, he may order service by registered mail addressed to their last known addresses, or by publication thereof, or both, as he may direct. It shall be sufficient to confer jurisdiction if (1) personal service is effected at least 72 hours before the date of hearing; [or] (2) registered mail is mailed at least 5 days before the date of hearing if within the state or 14 days if outside of the state[.]

We initially note that the first sentence in MCL 712A.13 – "[s]ervice of summons may be made anywhere *in the state* personally" – suggests that personal service is not necessary when the recipient of the summons resides out of state, which evidently was the case here. Respondent-mother's entire argument on this issue consists of a mere two paragraphs, absent any acknowledgement, mention, or analysis of MCL 712A.13, *the controlling provision*. Accordingly, the issue has effectively been waived due to insufficient briefing and is rejected. *Mudge*, 458 Mich at 105. Moreover, assuming that personal service of the termination summons in Ohio was required in the first place, we conclude that the trial court effectively complied with MCL 712A.13, accomplishing the purpose intended by the statute. See *In re Mayfield*, 198 Mich App at 232-233 (indicating that despite sending notices by ordinary first-class mail to the respondent's last known address, the intent behind MCL 712A.13 was still satisfied because nothing more could have been accomplished by sending the notices by registered or certified mail). Reversal is unwarranted.

Finally, respondent-mother contends that the trial court, in relationship to the order arising out of the dispositional hearing on May 24, 2013, violated MCR 3.973(F)(2), which provides that "[t]he court shall not enter an order of disposition until it has examined the case service plan . . . ." Contrary to respondent-mother's argument, a case service plan dated May 20, 2013, is contained in the record, and the transcript of the hearing on May 24, 2013, reflects that the trial court had indeed examined the case service plan. And is also clear from the record that the trial court had examined and took into consideration the case service plan throughout the proceedings, including the termination hearing. Reversal is unwarranted.

Affirmed.

/s/ Michael J. Riordan
/s/ William B. Murphy
/s/ Mark T. Boonstra